

# WIDENER LAW SYMPOSIUM JOURNAL

---

Volume 5Winter 2000

---

## LEARNING THE WRONG LESSONS FROM HISTORY: WHY THERE MUST BE AN INDEPENDENT COUNSEL LAW

ERWIN CHEMERINSKY\*

### I. INTRODUCTION

Context matters so much. After Watergate, the need for an independent counsel was obvious and overwhelming. The Nixon Justice Department was deeply implicated in the Watergate cover-up and clearly could not be trusted to conduct a thorough and impartial investigation.<sup>1</sup> The use of a special prosecutor within the Justice Department proved inadequate when the President fired Archibald Cox for not following orders to accept edited transcripts rather than tapes and to refrain from seeking further tapes of White House conversations. After Cox was fired, thirty-five bills were introduced into Congress for the creation of an independent special prosecutor.<sup>2</sup> One of these, S. 2611, introduced by Senator Birch Bayh (D. Ind.), was the basis of the law adopted five years later that created the office of the independent counsel.<sup>3</sup>

The statutory provision regarding the independent counsel expired on June 30, 1999, and few lamented the failure of Congress to renew it. After the abuses by Kenneth Starr's office in the investigation of President Clinton, few are willing to defend the renewal of the authority for independent counsel. For example, newspapers such as the Los Angeles Times editorialized against extending the authority for an independent counsel.<sup>4</sup> Starr's investigation of Clinton seemed to provide overwhelming proof of the problems with the law: an independent

---

\* Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California. I want to thank Mariana Aguilar for her excellent research assistance.

1. For a detailed history of the events surrounding Watergate and the Watergate cover-up, see THEODORE WHITE, *BREACH OF FAITH* (1975).

2. See Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 608 (1998).

3. *Id.* at 609.

4. See Editorial, *An Unmourned Death: If the independent counsel law is headed for a deserved extinction, the question of how to best deal with possible wrong doing in high places remains*, L.A. TIMES, Feb. 25, 1999, at 1-2, available in 1999 WL 2133508.

counsel has enormous prosecutorial power, but with virtually no checks or controls.<sup>5</sup> After the Whitewater debacle, the idea of an independent counsel seems clearly doomed. Many Republicans have always opposed the law because of its anti-Nixon origins and because of its use against Republican presidents, such as in the Iran-Contra scandal.<sup>6</sup> Now Democrats have equal reason to hate the independent counsel statute because of how it was used against the Clinton administration.

In this essay, I wish to be a voice to the contrary. I believe that an independent counsel law is imperative. Simply put, there is no viable alternative to ensuring an adequate investigation of a President or high level executive officials. The lessons to be learned from the abuses of the Whitewater special prosecutor should be about how to reform the law, not why to end it. In particular, part II of this essay explains why there are no viable alternatives to the independent counsel law. Part III then suggests ways of reforming the law to minimize the abuses, especially in light of the lessons that should be learned from Whitewater.

There already is voluminous literature debating the merits of the idea of a special prosecutor outside the control of the President or the executive branch.<sup>7</sup> I add my voice to this debate because of my deep concern that the non-renewal of authority for an independent counsel is entirely a reaction to the most recent abuses of the law. There must be a mechanism for a truly independent investigation when a President or other high level official is accused of a crime. None exists without an independent counsel law.

Ultimately, the debate over the independent counsel centers on how to resolve the tension between the desire for independence and the desire for accountability. Those who favor the independent counsel law stress the need for an independent investigation of the President and high level executive officials when there are allegations of wrong-doing. Those who criticize the independent counsel law emphasize the lack of accountability in having a prosecutor not checked through the usual mechanism.<sup>8</sup>

This tension between independence and accountability is not unique to the debate over the independent counsel law. Quite the contrary, it is at the core of countless constitutional issues. At both the state and federal level, there is a major debate over how to ensure judicial independence while still preserving some judicial accountability. Similarly, in the area of federalism and the Eleventh Amendment, which is a topic that has received much attention from the Supreme Court in recent years, the dispute is between those who would favor providing

---

5. The problems with the independent counsel law, as evidenced by the conduct of the Whitewater independent counsel, are discussed *infra* Part III.

6. The law actually expired for two years in 1992 and was renewed after Clinton took office, in large part because of his support. See Gormley, *supra* note 2, at 639.

7. See, for example, the excellent symposia in 51 ADMIN. L. REV. (1999), 62 LAW & CONTEMP. PROBS. (1999), 86 GEO. L.J. (1998), 49 MERCER L. REV. (1998).

8. See, e.g., Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267 (1998).

independence to state governments and those who emphasize the need for ensuring state accountability.<sup>9</sup> Within the realm of separation of powers, in defining the ability of Congress to limit removal of executive officials, the issue is whether they should be independent of the President or accountable to him.<sup>10</sup>

My thesis is that independence in the investigation of the President and high level executive officials is crucial. However, there is a need to make sure that there are some checks on the independent counsel to provide accountability. The current law is flawed in this regard, but those deficiencies can be corrected.

## II. THERE IS NO EFFECTIVE ALTERNATIVE TO AN INDEPENDENT COUNSEL

### *A. The Need for an Independent Counsel*

Few maxims are more central to American government than that no person, not even the president, is above the law. If a president or high level executive official is alleged to commit a crime, there must be a thorough investigation, and if the evidence warrants, a prosecution. No one, I am sure, would doubt this premise. The events of the 20th century—from Teapot Dome to Watergate, and from Iran-Contra to Whitewater—are powerful reminders that there will be occasions in which a president or high level official is accused of criminal conduct. Indeed, the experience under the independent counsel law is powerful evidence that it is unlikely that any administration will be entirely without scandal. Since the law was adopted, every presidency has had serious allegations involving high level officials sufficient to warrant the appointment of an independent counsel.

It is imperative that the investigation be perceived as impartial and not a cover-up. If the conclusion of the investigation is that there is not enough evidence of wrong-doing to proceed, the American public must have reason to believe that this is based on an independent investigation and not simply the result of partisanship. Moreover, if the investigation finds sufficient evidence to warrant further action, whether a prosecution or impeachment proceedings, the public must have reason to believe that this was the result of an impartial decision and not simply a partisan desire to get the incumbent.

The rationale behind the independent counsel law is that the President and other high level executive officials should be investigated by someone who is not ultimately accountable to the President. Allowing the Department of Justice to conduct investigations, and the Attorney General to make final decisions, risks

---

9. See generally *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999) (analyzing whether it was within Congressional power to compel states to surrender immunity under the Patent Remedy Act); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress did not have the power to abrogate state sovereignty).

10. See *Humphrey's Executor v. United States*, 295 U.S. 602, 619 (1935); *Myers v. United States*, 272 U.S. 52, 106 (1926).

at least the perception of bias. This is because the Attorney General is a part of the administration and can be removed by the President at any time. Under the Constitution, the President also has the duty to "take care" that the laws are faithfully executed and, in this capacity, the President has the final say on federal law enforcement decisions.<sup>11</sup> Therefore, even if the actual decisions are bias free, there is reason to worry that a Justice Department conclusion that the President did nothing wrong will always be suspect.

In *Morrison v. Olson*, the United States Supreme Court, by a 7-1 margin, upheld the independent counsel law as constitutional.<sup>12</sup> The Court concluded that there was no incongruity in having judges appoint the independent counsel. Indeed, the Court said that in light of the desire for independence in investigating alleged wrong-doing within the executive branch, "the most logical place to put [the appointment power] was in the Judicial Branch."<sup>13</sup>

The assumption, of course, is that independent counsels will be selected so that they are perceived as being impartial and not seen as biased for or against those whom they are investigating. Indeed, Kenneth Starr was exactly the wrong person to be an independent counsel investigating President Clinton. By virtue of his role in the Bush Administration and his other affiliations, it was inevitable that Starr would be perceived as partisan and that any findings against Clinton would be suspect.

Assuming that the independent counsel is selected so as to offer the perception and reality of independence, the law serves a vital function. The crucial question then is whether there is any alternative to the independent counsel law that can offer the same appearance, and actuality, of impartiality.

#### *B. There Are No Viable Alternatives to an Independent Counsel*

Now that the independent counsel law has expired, what are the options the next time there is credible evidence that a President or top executive official has broken the law? The voluminous literature about the independent counsel yields two alternatives, a special prosecutor within the Justice Department and Congressional investigations, which are inadequate substitutions for an independent counsel.<sup>14</sup> A third proposal that warrants examination is a recent suggestion to create an inspector general within the White House, rather than rely on independent counsels.<sup>15</sup> Although an inspector general would be desirable, it is not an adequate substitute for an independent counsel.<sup>16</sup>

---

11. U.S. CONST. art. II, § 3.

12. 487 U.S. 654 (1988).

13. *Id.* at 677.

14. See *infra* notes 17-22 and accompanying text.

15. See Kathleen Clark, *Toward More Ethical Government: An Inspector General for the White House*, 49 MERCER L. REV. 553, 561 (1998).

16. See *infra* notes 17-22 and accompanying text.

### 1. Special prosecutors within the Justice Department

Several commentators have suggested that there is no need for an independent counsel law because special prosecutors can be appointed within the Justice Department when there is a need for an independent investigation.<sup>17</sup> This, of course, is the procedure that was used to appoint both Archibald Cox and Leon Jaworski during the Watergate probe. It also occurred earlier this century when President Calvin Coolidge appointed two special prosecutors, one Democrat and one Republican, both confirmed by the Senate, to investigate the Teapot Dome scandal.<sup>18</sup> The argument is that elimination of the independent counsel law does not mean the elimination of special prosecutors. They can exist through appointment by the Justice Department.

For several reasons this alternative seems inadequate.<sup>19</sup> First, the absence of any statutory triggering requirement means that special prosecutors are likely to be appointed only when there is substantial public pressure for their creation. However, the Ethics in Government Act required that the Attorney General, after preliminary investigation, appoint an independent counsel if he or she "determines that there are reasonable grounds to believe that further investigation is warranted."<sup>20</sup> This applies to matters that come to the public's attention, and those that don't. Therefore, relying solely on special prosecutors within the Justice Department means that they are unlikely to be appointed in situations where there is not significant publicity of wrong-doing. For instance, if the FBI uncovers evidence of wrong-doing as part of another investigation, the public may never learn of this and therefore no pressure would mount for the appointment of an independent counsel.

Pressure certainly will build for the appointment of a special prosecutor when it is the President who is accused of wrong-doing. But, this is much less likely to occur when a much less visible executive official is similarly accused of wrongdoing. Also, no special prosecutor will be appointed if the President decides that it is more advantageous to take the political heat rather than to make the appointment.

Second, there are no protections against removal so long as the special prosecutor is part of the Justice Department. Ultimately, the Attorney General reports to the President and can be removed by the President at any time. By

---

17. See, e.g., Sunstein, *supra* note 8, at 2281; Niles L. Godes & Ty E. Howard, *Independent Counsel Investigations*, 35 AM. CRIM. L. REV. 875, 895 (1998); David A. Strauss, *The Independent Counsel Statute: What Went Wrong?*, 51 ADMIN. L. REV. 651, 654 (1999).

18. See Gormley, *supra* note 2, at 628.

19. See Donald C. Smaltz, *The Independent Counsel: The View From Inside*, 86 GEO. L.J. 2307, 2325-27 (1998) (arguing against special prosecutors within the Justice Department as an alternative to an independent counsel).

20. 28 U.S.C. § 592 (c)(1)(A) (1994).

controlling the Attorney General, the President thus has the legal and practical ability to decide whether to fire the special prosecutor. In part, the danger is that the special prosecutor knows this and, at times, it can affect decisions, consciously or otherwise. Furthermore, there is a risk that a President who is willing to take the political heat will fire a special prosecutor, as Richard Nixon did to Archibald Cox.

Those who oppose the independent counsel can reply that political pressure is a check against firing. After all, after Nixon ordered Cox's dismissal, intense political pressure forced the appointment of a new special prosecutor, Leon Jaworski. The problem with this argument is again that political pressure is likely to form only in a situation like Watergate where the public has significant evidence of wrong-doing by the President. Without such information, and unless it involves the President or a very prominent executive official, sufficient public pressure is unlikely to form.

Finally, the key question in evaluating special prosecutors within the Justice Department is whether there is an appearance of independence when investigating a high official within the executive branch. As explained earlier, the goals of the independent counsel law are both actual independence and, equally important, the appearance of independence. If the Justice Department does not pursue an investigation, the public must have confidence that this is because of a lack of evidence and not a partisan judgment. A decision made within the Justice Department, even by a person called a "special prosecutor," is unlikely to have the same credibility as one made by a person independent of the executive branch.

Now that the independent counsel law has expired, special prosecutors within the Justice Department are the best mechanism for ensuring independence when there are allegations against the President or top-level executive officials. But, this does not offer the same degree of independence or the same basis for public confidence in the investigation as with an independent counsel.

## 2. Congressional investigations

Some suggest that investigations by Congress make the independent counsel unnecessary.<sup>21</sup> Congress, of course, has subpoena power and can investigate allegations of wrong-doing within the executive branch of government. For example, there is no doubt that the Senate Select Committee on Watergate,

---

21. See, e.g., TERRY EASTLAND, *ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE 1789-1989* 134 (1989) (explaining that congressional investigations and impeachment are an alternative to an independent counsel); Stephen G. Dormer, *The Not-So Independent Counsel Law: How Congressional Investigations Undermine Accountability Under the Independent Counsel Act*, 86 GEO. L.J. 2391, 2392-93 (1998); Godes & Howard, *supra* note 17, at 895 (presenting the argument that Congressional investigations can uncover the truth).

chaired by Senator Sam Ervin, played a key role in uncovering the wrong-doing within the Nixon administration.

Although Congressional hearings are an important mechanism for investigation, they do not substitute for independent counsels. Most importantly, decisions within Congress inevitably will be perceived as political and not independent of partisanship. If Congress is controlled by members of the political party opposite from the President, its actions always will be subject to criticism as politically motivated. (For this reason, I have no doubt that history will view the impeachment of President Clinton as solely an exercise of partisan politics.) On the other hand, if Congress is dominated by the President's political party, aggressive investigation is much less likely and any conclusions of acquittal are likely to be suspect.

Also, while Congress has the ability to investigate, it cannot prosecute. There is a crucial difference between investigating to expose wrong-doing and investigating to prepare a case for prosecution in court. Congress cannot and does not do the latter. Indeed, congressional investigations can obstruct subsequent prosecutions, such as when Congress gives immunity.<sup>22</sup>

None of this is meant to argue against congressional investigations. They serve a vital function. Rather, the point is that they do not offer a substitute for an independent counsel law.

### 3. An inspector general for the White House

Professor Kathleen Clark has proposed an intriguing alternative to the independent counsel: an inspector general for the White House.<sup>23</sup> Inspector generals exist in agencies and departments throughout the executive branch of government. Their job is to investigate allegations of wrong-doing within their departments, conduct regular audits, and make reports to Congress.<sup>24</sup> Professor Clark points out that the White House is one of the few executive branch institutions without an inspector general.<sup>25</sup>

Professor Clark makes a very persuasive argument for an inspector general for the White House. Indeed, as Professor Clark observes, with the non-renewal of the Ethics in Government Act there is a great need for a mechanism to ensure accountability within the executive branch.<sup>26</sup> An inspector general for the White House is one such approach.

I do not disagree with creating a permanent inspector general within the White House. The question is whether it is an adequate substitute for an independent

---

22. *See, e.g.*, *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990); *Dormer*, *supra* note 21, at 2406.

23. *Clark*, *supra* note 15.

24. *Id.* at 560.

25. *Id.* at 561.

26. *Id.* at 563-64.

counsel. For several reasons, I think not. First, the inspector general lacks prosecutorial authority; its role is solely investigatory. An inspector general therefore provides no answer to the question of how prosecutions of officials within the executive branch should be handled. Without an independent counsel, these prosecutions would either be handled by the Justice Department or by a special prosecutor within the Justice Department. As explained above, neither is an adequate substitute for an independent counsel.

Second, an inspector general is part of the White House. Therefore, its investigations will not have the same credibility as ones conducted by outsiders. In addition, an inspector general for the White House will face unique obstacles to investigations, including executive privilege. Of course, an independent counsel investigation also can be met with claims of executive privilege. However, the Supreme Court held in *United States v. Nixon* that a prosecutor's need for evidence at a criminal trial outweighs executive privilege.<sup>27</sup> In contrast, an inspector general could have no authority to overcome such claims of executive privilege.

Finally, having observed the frustrating experiences of the inspector general in the Los Angeles Police Department, I am skeptical of relying on it as an alternative to an independent counsel.<sup>28</sup> After the beating of Rodney King by Los Angeles police officers, a commission chaired by Warren Christopher conducted a thorough investigation of the department. One of its most important reforms was the creation of an inspector general within the police department. Voters amended the Los Angeles Charter to create such an office.

Unfortunately, the inspector general did not function as intended. Indeed, the first Inspector General, Katherine Mader, quit in frustration. Mader was told that she was limited in what she could investigate and restricted to having access only to aggregate data, not individual case files. She even was instructed that she could not speak to the civilian Police Commission that manages the department, but instead could report only to its executive director.

A new City Charter, adopted in June 1999, seeks to remedy these deficiencies and gives the inspector general the authority to investigate any matter, with full access to information, and with the authority to report directly to the Police Commission. The reform takes effect in July 2000, so it is not possible to assess its effectiveness at this time. The Los Angeles experience suggests the difficulty with placing an inspector general in a relatively closed department—like a police force or the White House—and provides a basis for doubting its efficacy as an alternative to an independent counsel.<sup>29</sup>

---

27. 418 U.S. 683, 713 (1974).

28. From 1997-1999, I served as chair of the Elected Los Angeles Charter Reform Commission, which, among other issues, studied the office of the inspector general and proposed reforms which were adopted on June 8, 1999 to take effect on July 1, 2000.

29. Indeed, in a recent article, I have proposed both strengthening the inspector general for the Los Angeles Police Department and also creating a permanent special prosecutor to investigate



### III. REFORMING THE INDEPENDENT COUNSEL LAW

When reforming the independent counsel law, the fundamental question is how to strike a balance between independence and accountability in investigations of the President, and other top-level executive officials. The prior section argued that traditional mechanisms, Justice Department and congressional investigations, offer inadequate independence. However, the central criticism of the independent counsel is that it provides insufficient accountability. The experience with the Whitewater special prosecutor certainly supports that fear. There is a widespread sense that the Starr investigations were not limited by usual constraints imposed on prosecutors and that many abuses occurred as a result. Prosecutorial power is enormous and there is a grave danger when this authority is largely unchecked.

The ultimate question is whether the benefits in terms of independent investigations outweigh the costs with regard to the loss of accountability when there is a special prosecutor. After Watergate, the answer seemed clearly yes. Now after the Whitewater special prosecutor and the events of the past year, the answer to many seems clearly no. Not surprisingly, President Clinton is among those who have experienced this shift in views. The independent counsel law expired in 1992, and it was not renewed until 1994, when President Clinton took office and supported it.<sup>30</sup> It is reported that subsequently President Clinton told Bob Dole, an opponent of renewing the Ethics in Government Act, "You were right and I was wrong on the independent counsel."<sup>31</sup>

If the choice is limited to renewing the law as it was, or permitting it to expire, the balance is difficult. The law does provide independent investigations, but the absence of accountability risks abuses. These, however, are not the only choices. The better course is to revise the law in light of recent experiences, and to enact a revised version of the Ethics in Government Act.

Many have suggested possible reforms of the Act.<sup>32</sup> Among the various options, three seem particularly important in enhancing accountability under the independent counsel law: revising the method used to appoint independent counsels, increasing the special division's oversight of the independent counsel, and limiting the use of the law.

---

and prosecute wrong-doing by officers. See Erwin Chemerinsky, *Commentary, Independence is the Key for Supervision of LAPD: Rigorous Oversight by the Inspector General and Police Commission Plus an Outside Prosecutor are Needed*, L.A. TIMES, Sept. 21, 1999, at B3.

30. Gormley, *supra* note 2, at 639.

31. *Id.* (quoting BOB WOODWARD, *THE CHOICE: HOW CLINTON WON* 444 (1997)).

32. The most thorough and thoughtful of these proposals has been advanced by Professor Gormley. See Gormley, *supra* note 2.

*A. Change the Method of Appointing the Independent Counsel*

Under the Ethics in Government Act, the Chief Justice of the United States Supreme Court appoints a three-judge panel to serve as a "special division" which appoints the independent counsel.<sup>33</sup> The special division has complete discretion as to whom to choose for this role. The special division acts entirely in secret; it announces its choice for independent counsel without any public hearings or comments.

While federal court rules provide that cases in all federal districts and all federal courts of appeals be randomly assigned to federal judges,<sup>34</sup> a single person, the Chief Justice, selects the judges for the special division. A statute provides that the panel shall consist of three federal court judges, one of whom must be a judge of the United States Court of Appeals for the District of Columbia Circuit, and no two of the judges can be from the same court.<sup>35</sup> There is a great danger that the choices will be perceived as partisan. For example, a conservative Chief Justice, such as William Rehnquist, is perceived as likely to select conservative judges. This immediately leads to the danger that the choice of an independent counsel will be perceived as an act of partisanship.

The selection of Kenneth Starr as Whitewater independent counsel indicates this danger. Judge Sentelle, of the United States Court of Appeals for the District of Columbia Circuit, was the presiding judge of the special division at that time. Sentelle, a Reagan appointee, is widely regarded as being very conservative. According to published reports, Sentelle's wife, who worked in the office of Republican Senator Lauch Faircloth, arranged a lunch between Faircloth and Sentelle. The apparent purpose of the lunch was for Faircloth to urge Sentelle to replace Whitewater independent counsel Robert Fiske with a more aggressive independent counsel.<sup>36</sup> This process ensured that the decision to oust Fiske would be perceived as partisan.

The selection of Kenneth Starr as the new independent counsel enormously compounded this perception. Starr had been an official in the Reagan Justice Department, a Reagan appointee to the D.C. Circuit, and Solicitor General during the Bush administration. He was hardly perceived as neutral or non-partisan. The goal of the independent counsel law is to have investigation and prosecution handled by a person that the public will perceive as unbiased; this benefit is lost if the prosecutor is seen as predisposed either for or against the President. For instance, there was just no way that the staunch Republican Starr was going to be

---

33. 28 U.S.C. § 593(b).

34. 28 U.S.C. § 137 states that "[t]he business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court." Accordingly, the assignment of cases is governed by local rules.

35. 28 U.S.C. § 49(d).

36. See Joan Biskupic, *Choosing the Independent Counsel; Power of Three Judge Panel Breeds Questions of Partisanship*, WASH. POST, Apr. 13, 1997, at A-12.

perceived as neutral or impartial by Democrats during the Whitewater investigation.

Many proposals have been advanced for changing the method of appointing the independent counsel. Some have suggested having the President appoint the independent counsel, with Senate confirmation.<sup>37</sup> Others have proposed that the Attorney General provide the special division with a list of candidates for the position<sup>38</sup> or, at least, consult with the special division before a selection is made.<sup>39</sup>

Each of these proposals has merit and each would be an improvement over the status quo. I would offer another alternative: choose the members of the special division randomly, just as judges for all cases are randomly selected in the federal system. This would eliminate the perception of partisanship in the composition of the panel which chooses an independent counsel.

Moreover, the special division should be required to conduct its selection process more openly. Specifically, it should be required to publicly announce the three finalists for the position and to receive public comments about them. Such a process would have indicated that Starr was unacceptable for the role of Whitewater independent counsel because he was widely perceived as a partisan.

The objection is that if their candidacy is publicly disclosed, and publicly commented upon, some qualified individuals will refuse to be considered for appointment to be an independent counsel. This is probably true, but there is no reason to believe that it will lead to an inadequate pool of candidates for the position. For most important positions in government—elected or appointed—there is the opportunity for public discussion prior to the selection. Of course, for elected officials, campaigns exist where qualifications and abilities are openly discussed. For appointed officials, including federal judges, there is a confirmation process. Requiring discussion of candidates for the position of independent counsel is not a departure from the norm, but consistent with the almost universal practice for all holding important offices.

#### *B. Increase the Special Division's Oversight of the Independent Counsel*

A key problem with the current law is the almost complete absence of checks or review on the independent counsel.<sup>40</sup> Prosecutors have enormous power and there are inherent risks of abuses. Traditional checks include electoral review for elected prosecutors, such as district attorneys, and supervisory control for appointed prosecutors. But what is the check for the independent counsel? The

---

37. See Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2145-49 (1998).

38. *The Independent Counsel Statute: Hearings on 28 U.S.C. § 591-9 Before the House Judiciary Comm.*, 106th Cong., (1999) (statement of Philip S. Anderson).

39. See Gormley, *supra* note 2, at 684-85.

40. See Strauss, *supra* note 17, at 652.

Attorney General can remove an independent counsel for "cause" under the statute,<sup>41</sup> but this power is likely to be exercised in only the most unusual circumstances. The appropriate body to oversee the independent counsel is the one that appoints him or her: the special division. The statute provides that if the Attorney General determines that further investigation or prosecution is warranted, a panel of federal court judges "shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction."<sup>42</sup>

Professor Gormley persuasively argues that Congress intended the special division to perform an oversight function.<sup>43</sup> Yet, that is not how the law has operated in practice. "Unfortunately, the court has shrunk down its own role to almost nothing. After appointing an independent counsel and establishing his or her jurisdiction, the court has done little more than rubber-stamp the special prosecutor's actions."<sup>44</sup>

Professor Gormley quotes Judge John D. Butzner, Jr., a member of the special division, answering the following question: "Once the independent counsel has been appointed and the order signed defining his scope, what does the court have to do as far as the investigation?" Judge Butzner replied: "Very little, and less than that."<sup>45</sup> Professor Gormley states that "Judge Butzner's response may accurately sum up the approach taken by the special court to date, but it hardly matches the model envisioned by Congress."<sup>46</sup>

The special division can exercise oversight in a number of ways. The special division can define the scope of the investigation and limit its expansion. Many were greatly troubled when the special division increased the independent counsel's jurisdiction in the Whitewater investigation to include the issue of whether President Clinton committed perjury, in his deposition in the civil suit by Paula Jones, concerning his relationship with Monica Lewinsky. It is difficult to imagine a way in which this was "related" to Whitewater.

There should be a presumption against increasing the jurisdiction of the independent counsel as part of checking the possibility of prosecutorial abuses by that office.<sup>47</sup> In addition, the statute should make clear that "related case" jurisdiction requires the consent of the Attorney General,<sup>48</sup> who must make the initial recommendation for an independent counsel. It should also include a

---

41. 28 U.S.C. § 596(a).

42. 28 U.S.C. § 593 (b).

43. Gormley, *supra* note 2, at 678-79.

44. Gormley, *supra* note 2, at 680.

45. *Id.*

46. *Id.*

47. *See id.* at 666-68.

48. *See* Symposium, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, 54 WASH. & LEE L. REV. 1515, 1534 (1997).

narrower definition of “related case.”<sup>49</sup> Most of all, it is for the special division to exercise control over the independent counsel by limiting the scope of investigations.

Additionally, and importantly, the special division needs to exercise budgetary control over the independent counsel. Many have criticized the absence of any budget checks on investigations.<sup>50</sup> The special division should set a budget for the independent counsel and insist that it is adhered to, unless the independent counsel makes a compelling case for increasing it. However, Congress, with its control over the spending power, ultimately has final say over the amount allocated to independent counsel investigations and prosecutions.

The special division also can exercise control over the duration of independent counsel appointments and prosecutions. A concern has rightly been raised that independent counsel investigations have lasted an inordinately long amount of time and without any apparent check on their duration.<sup>51</sup> The special division could set time limits and also can terminate investigations upon determining that the work of the independent counsel is complete. The special division should conduct periodic reviews of the work of the independent counsel, and decide when it is time to end a particular investigation.<sup>52</sup>

Additionally, the special division should conduct inquiries into alleged abuses by independent counsels that it has appointed and, where warranted, replace the individual. The reality is that no one else exists to perform this function. The Attorney General’s office is, and should be, limited in its control over the independent counsel to ensure independence and the appearance of independence. Furthermore, Congress can, and should, exercise only so much oversight of an independent office. The special division, in contrast, has credibility for its neutrality and is in the best position to be in an oversight role.

It can be argued that such oversight is not an appropriate function for judges. In *Morrison v. Olson*, the United States Supreme Court found that the Act does not give the federal courts any authority “to ‘supervise’ the independent counsel in the exercise of his or her investigative or prosecutorial authority.”<sup>53</sup> Yet, in approving placing appointment power in judges, the Supreme Court recognized that this also carried with it administrative responsibilities. The Court declared: “[T]he functions that the Special Division is empowered to perform are not

---

49. Philip B. Heymann, *Four Unanswered Questions About the Responsibilities of an Independent Counsel*, 86 GEO. L.J. 2119, 2126 (1998).

50. See, e.g., John Q. Barrett, *Independent Counsel Law Improvements for the Next Five Years*, 51 ADMIN. L. REV. 631, 643 (1999); Strauss, *supra* note 17, at 652; Charles Tiefer, *The Specially Investigated President*, 5 U. CHI. L. REV. 143, 198-99 (1998).

51. See, e.g., Symposium, *A Roundtable Discussion on the Independent Counsel Statute*, 49 MERCER L. REV. 453, 474 (1998).

52. See Gormley, *supra* note 2, at 669-70 (calling for periodic review of investigations by independent counsels).

53. *Id.* at 681.

inherently 'Executive'; indeed, they are directly analogous to functions that federal judges perform in other contexts.”<sup>54</sup> For instance, when federal courts appoint special masters the judges play all of these oversight roles: defining the scope of the special master's jurisdiction, setting a budget and time limits for the special master, overseeing the work of the special master and considering any problems arising from the special master's work.

Those who criticize the absence of accountability for independent counsels under the Ethics in Government Act are correct. However, the solution is not to scrap independent counsels, but rather to increase their accountability.

### *C. Limit the Use of the Independent Counsel Law*

This article has acknowledged that there are costs, in terms of accountability, in using an independent counsel rather than the Justice Department to handle investigations and prosecutions. Therefore, an independent counsel should be used only when there is significant reason to believe that the necessary level of public confidence would be lacking if the matter was handled within the executive branch. For example, allegations against the President, Vice-President, or top-level officials, such as cabinet secretaries, should be investigated by an independent counsel.

However, the recently expired law required independent counsels for a much larger number of executive branch employees. It is estimated that “nearly 240 persons are covered, most of whom hold 'considerably subordinate positions' in the executive hierarchy.”<sup>55</sup> The result is that the statute applies in situations where there is no need for an independent counsel to ensure the appearance of non-partisan investigations.<sup>56</sup> A revised statute should be adopted with a significantly narrower scope in terms of executive officials covered by the law.<sup>57</sup> Professor Gormley makes a persuasive argument for this change: “Since the public has 'come to distrust' the office of independent counsel itself, due to overuse of the statute during its controversial twenty-year lifetime, reducing the field of coverage to essential cases would enhance its central purpose of rehabilitating public trust in American government.”<sup>58</sup>

---

54. *Morrison v. Olson*, 487 U.S. 654, 681 (1988).

55. Gormley, *supra* note 2, at 650.

56. See Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 464 (1996).

57. See Lawrence Walsh, *The Need for Renewal of the Independent Counsel Law*, 86 Geo. L.J. 2379, 2384 (1998).

58. Gormley, *supra* note 2, at 652-53.

## IV. CONCLUSION

I believe that when historians look back at the amazing events of 1998 and early 1999 they will describe how it was a set of circumstances where everything that could go wrong, did go wrong. First, a federal judge inexplicably allowed President Clinton to be asked questions about unrelated sexual relationships, even though they had no possible relevance to the civil suit by Paula Jones. Clinton's lawyer inexplicably did not object to the questions. Clinton then lied in his answers. Moreover, Clinton chose to repeat the lies, rather than "come clean," once the perjury was exposed. Whitewater Independent Counsel Kenneth Starr was given jurisdiction to investigate the issue, even though it had no conceivable relevance to the Whitewater matter. In addition, Clinton had the misfortune of having a Republican House of Representatives that pursued impeachment proceedings, even after opinion polls indicated there was no public support for them and even after the voters in the November 1998 elections gave every indication of rejecting the Republicans' efforts. The House impeached, by a purely partisan vote, even though it was clear that there were not the votes in the Senate to obtain a conviction.

There have been many costs to this tragedy. One of the victims is the independent counsel law. After these events, there was no conceivable way that the President or the Democrats were going to support renewal of the statute. There always has been strong Republican opposition to it. The public now associates special prosecutors not with the noble Archibald Cox, but instead with the abuses of Kenneth Starr.

Yet, the choice to allow the independent counsel law to expire was terribly misguided. There will be serious allegations against a future President or top-level officials in a future administration. Unfortunately, at that time, there may not be a mechanism to ensure an investigation that is independent of the executive branch. Perhaps if there is another scandal, and the Justice Department is perceived as partisan or inadequate, the independent counsel law will be revived. But for now, the law seems dead.

In this article, I have argued that the wrong lessons have been drawn from this recent history. The better course would be to revise the independent counsel law to enhance accountability of investigations and prosecutions. Simply put, no other mechanism can offer the same degree of public confidence when there is the need to investigate the President or other high officials in the executive branch of government.

